FILED
AUG 13 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 331

Petition For Certiorari

GEORGE S. HOUSTON and HARGIS LANGDON, Trustees, Morris Wholesale Liquor Distributing Company, Inc., by HARVEY H. SMITH, Attorney in Fact, and HARVEY H. SMITH, in His Own Behalf.

Petitioners

vs

THE HONORABLE MAC SWINFORD, Judge of the United States District Court for the Eastern District of Kentucky, and the CIRCUIT COURT OF APPEALS for the Sixth Circuit, Hon. Xen Hicks, presiding Justice and J. W. Martin, et al.

Respondents

Petition for Certiorari of Morris Wholesale Liquor Distributing Co., Inc., by Harvey H. Smith, Attorney in fact, and George S. Houston and Hargis Langdon.

HARVEY H. SMITH,
1108 Fourth National Bank Bldg., Cincinnati, Ohio
Covington, Ky.

Attorney for Petitioners

(Guarantees violated, 5th, 7th, 14th Amendments, and Art I, Section 8, Constitution of the United States'.

POINTS — INDEX — SUMMARY

Statement of issue, 1-2 Paragraphs.

Court of Appeals Sixth Circuit refused to write findings; Paragraph 3.

Denied and remedy, paragraph 4.

Order dismissing Counter Claim made in Cynthiana, not a court place—violated rules when filed as court order. Paragraphs 4 and 5.

Judge refused to make findings or state of record, courts position 6-7.

Real cause of action—Paragraph 9-10, Jurisdictional liability, limitation against revivorship, none attempted, all orders thereafter void. Paragraph 10, sub. a, b.

Sub. Par. c—Statement of attachment action, void, not served as issued, not served by sheriff to whom issued.

Attachment for consumers taxes, import taxes in violation of sec. 8 Art I Constitution U. S. Par. 10, sub. c.

James W. Martin, Ex Rel. plaintiff in default for more than 6 months in pleading, Rule 60. No relief by court after six months; no action to vacate any order after 12 months, (except by appeal).

Default from May 1st, 1938 continuously without leave of court, but allowed to take judgment April 29, 1940, over objection of Defendant. Par. 10 sub. d. Rules ignored by Judge.

Par e. of 10—No revivorship after plaintiff Martin resigned, July 1939.

No judgment could be taken (Sixth Circuit), Court of Appeals of Kentucky, Kentucky Statute, section 999-US rule 25.

Motion of defendant for judgment January, 39 should have been sustained.

No revivorship after 12 months under Kentucky statute, none under US Rules after 6 months—judgments after that time void. Denied equal protection because there is no right of appeal to show misconduct and predjudice of the court by review. Appeal denied by both District and Appellate Court for Sixth Circuit. Par. sub. F.

Motion to Vacate findings (supposed), opinion in fact, Nov. 6th, 1939, after Martin's resignation as Internal Commissioner must be sustained as matter of right under Kentucky Code and Statute as well as US Rule 25 and USCA Statute section 780. Pages 8 to 12.

24th day of November, 1939, Pro Confesso judgment must be sustained, undenied—action was as matter of law proceeding exparte, tho the record shows that Answer and Counter Claim was filed Dec. 11, 1939, and unanswered or replied to. Sub. Par. 8-10.

No Penal attachment can be served in Kentucky out of the county where offense committed—this attachment void. Par. g. of 10.

Motion filed by an officer to dismiss without authority or right under Kentucky or Federal law. Judge refused to swear witness or receive any evidence from the Defendant or require notice of such action—Equal protection denied. Oliver case 156—Ky. 646.

Court refused to swear witness, but heard his testimony in the form of a written communication by motion, without attorney and without making said Morris a party to the action. Par. h, from pages 15 to 19.

Both respondent courts refused to make findings on demand of defendant. Pages 15-16, sub. h and I.

Judge refused allowance of motion for actual parties to litigate after Ed Morris had departed from the litigation in violation of fixed, positive rules of the Federal and State Courts.

Unrevocable power of attorney held by Harvey H. Smith from Morris Wholesale Liquor Distributing Company to carry out contract with Langdon and Houston as TRUSTEES. No Judgment can be taken in Kentucky without service or appearance of trustees, who appeared by petition. Pages 19-22 and par. 10, sub. J. K. I.

H. Clyde Reeves, without making him a party to the action, allowed by court to take judgment, without a hearing—all in defiance of the Code of Kentucky and US Rules, pages 19 to 22. Par. I. to M.

Orders made at Cynthiana, not a place to hold court, at suggestion of Counsel who had, under the law been expunged from the record; and at their suggestion without a hearing in open court. They had procured the said Morris to dismiss, without settlement of counsel fees, and in violation of contract with Houston and Langdon and other suitors for taxes.

The hearing required by law was denied page 23, Par. M.

Six months and one year default in pleading and default in revivorship, left the proceeding one on the cross petition. Denial of trial by JURY. Pages 23, 24, 25 and paragraph sub. M.

Houston and Langdon known real parties by court who refused filing of motion for order to make them parties in order that they could prosecute suit and secure relief for all parties, return of money had and received by the state. Pages 22 to 28.

Collection of money for taxes was under a void act since repealed, and repealed when Taxes were demanded made penalties void. Pages 28 to 30—attachment void. must be served as provided by the Code. Section 25 provides a judgment under the record here, is void. See page 29.

Judgment of settlement April 29th void—had no legal parties on either side, only such disbarred parties, who existed only in the imagination of the Respondent, Hon. Mac Swinford. Judgment of dismissal, void, of March 4th, 1940. Pages 29-30.

When an order of dismissal is proposed, the right of hearing is a constitutional right under the Constitutions of Kentucky and the United States. Page 30, denied by Judge.

Opinion of the Court that Corporation was "dissolved," then calling for evidence violated Kentucky and Federal rules, and law. No evidence can be received after judgment. Right to cross examine a witness is a constitutional right secured by Federal and State Constitutions—Denied to Harvey H. Smith by Judge. Pages 30, 31 and 32.

Neither Ed Morris or Morris Wholesale Liquor Distributing Company had any right or title in the actual res litigated under the assignment of May 15th, 1938, and the Judge knew this, but refused to allow Houston and Langdon to be made parties or to allow Harvey H. Smith to present their rights at a hearing. or file petition and have summons. Page 33, paragraph 34-35.

Tax act provided, and license Act and general statute, that Auditor must bring the action, not a party here—section 10 of the Act of 1934.

Agreement of settlement between parties who did not exist on the record, April 29, 1940, absolutely void.

Judgment entered that day void under Kentucky law. Page 37. Par. sub. v. pages 37-38 import taxes illegal under Kentucky decisions, and prohibited by sec. 3 Constitution of Kentucky.

Judge refused to allow petition filed and summons served as provided by section 25 of Kentucky Code, and they had and were collecting, (these men,) not parties to the suit, double taxes, suing for when refused, disallowed imports, unless tax paid in advance, then remaining in cause of action to defeat collection by assistance of respondent judge in this cause whose orders were orbitrary. Pages 38-39 decision of Court 302 US, 583.

Sub. w. 39—applied to Circuit Court of Appeals (respondent) who refused any relief by mandamus—requested findings which were denied. Page 39-40. Imposed Statute unconstitutional.

Without relief. Filing of petition moved for, required and allowed by Kentucky Code, section 502—"the order shall be served as a summons." The judge denied both petition and motion—the Sixth Circuit refused to give relief. Page 40.

Kentucky Code provides, if action is not revived motion to strike will be sustained—Judge denied filing of Motion to strike when presented or at all, after he had rendered JUDGMENT (Page 41).

April 29th to make appearance look right on the record a lawyer by name of Chapman was brought in when judgment against Morris was agreed or the corporation over which they had no control. Corporation could not sue. Page 43.

The Judge participated in all of these inlawful acts, denied a proper hearing whereby he knew from pleadings filed they would be exposed, and without making an order expelling Harvey H. Smith from the case referred to him in all cases as being no longer counsel, and this without a hearing. Page 44. Mandamus lies to order expelling counsel 4.

The order made by Judge at Cynthiana which he thought expunged Harvey H. Smith from the case recites both Martin and Reeves as parties, and the Order of April 29, recites a pred-

judicial order against all claims against the state in the name of the Morris Company, showing the ultimate purpose of all participants to judicate the claims without a legal hearing. Pages 45-46. Showing there the mistrust of Harvey H. Smith by the filing of a motion to dismiss to the court and clerk. Pages 46-47 Shows how H. Clyde Reeves was wormed into the case as plaintiff, without any hearing or any order, they believing if they could get Chapman in the case they could avoid passing on this question after they believed they had ousted Harvey H. Smith from the case.

47-48-49 shows Clifford Smith was never legally employed to represent the commonwealth and never at anytime had a right to appear.

The action below was ignored, without relief by the Sixth Circuit Court of Appeals' action in denying Mandamus, the only remedy available to defendants.

Violation of the laws of Kentucky for the protection of litigants, and the decisions of its highest court interpreting said laws. Therefore denial of equal protection of the laws and due process—14th Amendment to the Constitution of the United States Pages 48-49.

Exhibits begin at page 50.

Supreme Court of the United States

No. ————————

October Term, 1940

Petition For Certiorari

GEORGE S. HOUSTON and HARGIS LANGDON, TRUSTEES, MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., by HARVEY H. SMITH, ATTORNEY IN FACT, and HARVEY H. SMITH. IN HIS OWN PROPER PERSON,

Petitioners

vs.

THE HONORABLE MAC SWINFORD, JUDGE of the United States District Court for the Eastern District of Kentucky, and the CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, HON. XEN HICKS, PRESIDING JUSTICE, J. W. MARTIN, et al,

Respondents

PETITION FOR CERTIORARI FOR MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., BY HARVEY H. SMITH, ATTORNEY IN FACT, AND GEORGE S. HOUSTON AND HARGIS LANGDON.

In the cause of: J. W. MARTIN, et al, vs. MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., Inc. (Judgments void—No Appeal.)

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners in this behalf allege and complain:

1. That on or about the 4th day of March 1940, the Honorable Respondent, Mac Swinford, the regular Judge of the United States District Court for the Eastern District of Kentucky, sitting in the trial of this cause, then pending in said district, entered an order in Cynthiana, Kentucky, not a place designated to hold court, dismissing the counter-claim and cross-petition herein filed, with petitioners answer, in this cause, over the objection of its regular attorney, Harvey H. Smith, and who had not been deposed as such attorney, and who held a power of attorney in addition to his regular employment to do and perform certain things, which by agreement Morris Wholesale Liquor Distributing Co., Inc., agreed to, and the order of the respondent, Mac Swinford, was made in said court without notice to the said Harvey H. Smith, or said corporation, and without a proper hearing, as provided.

Illegal motion made by Ed. Morris — That thereafter your petitioners applied to the said United States District Court and demanded a full hearing according to law, and the opportunity of introducing testimony so as to determine the said motion made by Edward Morris, a stockholder and officer in said corporation, about which matters the court was entirely without jurisdiction. That at a later time, on or about the 29th day of April, 1940, the said court entered an order in said case, settling the issues and controversies therein, as he supposed, and against the interests of your petitioners, without a hearing, as the judge of said court, it being contended by the court at said time that Edward Morris had the right to make a motion to discharge the corporation attorney and dismiss said cross-petition, outside of the manner provided by law, and without factual or legal authority so to do, Kentucky law nullifying such motion as made.

(NOTE: Words in parenthesis are counsels — Exhibits are made part of petition by rules of this court).

2. Thereafter, your petitioners filed their application in the Circuit Court of Appeals for the Sixth Circuit, praying said court that a mandamus be issued to the said Honorable Mac Swinford, directing him, as the presiding Judge of said court, to enter an order revoking said order of dismissal and to grant the *motion* of your petitioners to make all the parties to the agreement, hereinafter alleged, parties plaintiff with the Morris Wholesale Liquor Distributing Co., Inc. That thereafter, the said Mac Swinford, Judge of said court, refused or failed, your petitioners are not able to determine which, to permit the filing of a notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit, which notice of appeal is legally necessary, and at the same time, they prayed the allowance of an appeal to said court from said order of March 4th, entered prior thereto, the said Respondent Mac Swinford refusing to allow said appeal because Harvey H. Smith was not attorney. That thereupon, your petitioners prayed the Honorable Circuit Court of Appeals for the Sixth Circuit to enter an order allowing mandamus against orders of the said Honorable Mac Swinford, as Judge of said court, and as the court, some of which orders were void, because not made by the court, but were made outside of the court, never entered by the Court, but at Cynthiana.

3. That the final order of the Judge, which was entered on March 4th, was entered without notice to Harvey H. Smith, attorney for Morris Wholesale Liquor Distributing Co., Inc., and the said Honorable

Mac Swinford affirmed the agreement entered into between Edward Morris and James W. Martin and H. Clyde Reeves, the said Martin being the resigned officer, as Internal Revenue Commissioner of Kentucky, which resignation took effect from the 1st day of July, 1939. The said H. Clyde Reeves was his successor in office, but had never qualified as by law provided, as his successor as revived plaintiff on his relation as such officer to the Commonwealth of Kentucky in this cause; and at all times there was no plaintiff thereafter. Nor had the court jurisdiction because the Franklin Circuit Court had none, prior.

4. That the Honorable Circuit Court of Appeals refused to make any findings in the cause although motion was filed in the application for mandamus, and the motion to allow an appeal was refused by the said District Court, with no reasons or no findings in the case. That your petitioners therefore have no adequate remedy as they understand the rules of this court except to apply to the Supreme Court of the United States with directions through and by a writ of certiorari to the Sixth Circuit Court of Appeals in the first instance, to make findings or to adopt the findings from your petitioners or refuse to make such findings by proper orders of the court, and to make a finding in respect to their said refusal to grant your petitioners an appeal from the said orders of the said Honorable Mac Swinford. That the order of March 4, 1940, made by the said Honorable Mac Swinford, in the opinion of your petitioners, was not a final order such as they might appeal from, and the order made on March 4th, 1940, settling said

cause of action involving more than $100,000, and which was made *without the consent of your petitioners,* without their knowledge, and without any authority upon the part of the Morris Wholesale Liquor Distributing Co., Inc., by Ed Morris and without any jurisdiction in said court to affirm or adopt said agreement as a judgment of the court.

5. That the order of the court, made in Cynthiane on March 4, 1940, is attached to this petition and made a part hereof, as Exhibit A, Sub. Y. and the said decree and order made on the 4th day of March, by the Honorable Mac Swinford, is a void order under the Code of Kentucky and the Court rules of the United States, and under the pleadings in this cause, but that the said District Court, presided over by the Honorable Mac Swinford, has not up to this time allowed an appeal from said order or allowed Harvey H. Smith and your petitioners to take exceptions to the same, it being a final order as to them, and has refused to sustain their motion for bill of exceptions in said cause, in order that your petitioners might show and prove to the Honorable Appellate Court that these orders that have been entered by the Honorable Mac Swinford and the pleadings filed, as a matter of law, by your petitioners, which were refused on the order of the said Honorable Mac Swinford, could not therefore be made a part of the record in this cause.

6. That the Honorable Mac Swinford, the Presiding District Judge, has heretofore refused to make any findings in this cause of action or to sustain a motion for findings made by the Morris Whole-

sale Liquor Distributing Co., Inc., by and through Harvey H. Smith, its regular attorney.

7. That the Power of Attorney given to Harvey H. Smith by the Morris Wholesale Liquor Distributing Co., Inc., was executed to and for your petitioners and Harvey H. Smith, it being represented at said time the Morris Wholesale Liquor Distributing Co., Inc., had complied with all of the laws of the State of Kentucky and could qualify in any action for or against itself, as such corporation, but that this fact was known to the officials of the State of Kentucky who represented the Internal Revenue Commissioner, the said H. Clyde Reeves, and the said James W. Martin, and the same was known by the said Edward Morris. That said Power of Attorney, as executed under the laws of Kentucky, is a valid and subsisting agreement, cannot be revoked except by a due process of law hearing. That no action has ever been brought to cancel said power of attorney for which it was executed and made, because the said corporation had no power to bring an action in the State of Kentucky, over objection nor defend an action in the State of Kentucky, but its contracts were valid, and said Respondent and said Morris knew this fact.

8. That on or about the 14th day of February, 1940 your petitioners ordered a motion to be presented to the Honorable District Court, asking for leave to file their petition, according to the Code of Kentucky, Sections 24 to 28 (Carroll's), whereby they would be made parties to the action and prosecute said action in the United States District Court, according to the rules controlling and governing said

court at said time. That this motion was never acted upon, nor denied until the said United States District Court, by the Honorable Mac Swinford, had rendered an order, more than one month thereafter, on March 4, 1940, dismissing the said counter claim cause of action. The said court, at said time, then refused (March 13, 1940) to consider said motion to make your petitioners parties to the action because the Judge had, prior to that time, entered an order dismissing said cause of action. This order of the Judge is made a part of this petition, denominated Exhibit C, and which motion, Exhibit B, at said time was attached to the motion to strike, and the said motion was presented to the Clerk of said court Feb. 14, 1940. That the exhibits herein referred to, from A to Y, are made a part of the petition and are referred to in order to complete the allegations of facts necessary to present to this Honorable Court their petition for a writ of Certiorari.

THE REAL CAUSE OF ACTION

9. That the real cause of action arises by an attachment suit brought by James W. Martin, then Internal Revenue Commissioner of Kentucky, against said corporation in the Franklin Circuit Court, sitting in Franklin County, Kentucky, a special court wholly without jurisdiction in this cause, decided by its highest court. That thereafter, under a void writ of attachment, 225 cases of liquors, then in the possession of the Morris Wholesale Liquor Distributing Co., Inc., were seized at Catlettsburg, Kentucky, by the Sheriff of Boyd County, a county other than Franklin County, where the Franklin Circuit Court

sits, which court had no jurisdiction to issue attachment for penalties under a criminal statute, but only to issue attachments under a civil statute, as provided by the Constitution of the State of Kentucky and the laws thereof; and an additional sixty cases, all of the value of $3000, at $10 per case. That the said Edward Morris, as Secretary of the said Morris Wholesale Liquor Distributing Co., Inc., was indicted in the criminal action in Boyd County, and injunction was refused by the Circuit Court of Boyd County, directed against James W. Martin, et al. In these actions, Harvey H. Smith acted as attorney for the said Edward Morris and the Morris Wholesale Liquor Distributing Co., Inc., and that an action also was filed on or about the 25th day of March, 1938, before the said James W. Martin and the Kentucky Beverage Liquor Control Board to cancel the said license of the said Morris Wholesale Liquor Distributing Co., Inc., to engage in and to do business in Kentucky, as a wholesaler of liquors. That Harvey H. Smith appeared and defended this action, and thereby prevented cancellation of the said license, which by law expired on the 1st day of July, 1938, and since that time has not been renewed.

10. That the following steps in this case have been taken, and the following facts are alleged as a part of this petition:—Jurisdictional and liability grounds.

(a) Action as to plaintiffs abated July 1, 1939, by operation of law under Kentucky decisions, which under the decision of the United States Supreme Court in Erie Railroad vs. Thompson are controlling here, provided such regulations are not inconsistent

with the rules of the United States Supreme Court, which rule 25 of the said Supreme Court rules and U. S. C. A. statute 780, are consistent with the said laws of Kentucky, except time of revivorship, which said rules of the said Supreme Court of the United States control as to time. (Carroll's Code). 501

(b) Petitioners allege no substitution was made within six months, as required by the Federal Statute, U. S. C. A., section 780, and rule 25, wherein it is provided that notice of revivorship shall be served, as under rules 4 and 5, and under the Kentucky Code, said notice shall be served and *time given of ten days for hearing,* and the final determination of said court must be recorded as a part of the minutes of said court in the docket of said court, and when said notice has been given and served of the hearing on said motion, which motion shall be based upon the application to make said parties a part of the cause of action a summons being required to be issued on said petition, and motion served to the responsible parties in the action, who were the said previous attorneys of James W. Martin and the Commonwealth of Kentucky, J. J. Leary and Sam Rosenstein, and the Attorney General, all necessary parties under the Kentucky Code to obtain jusridiction on said petition of intervention, but no service could be had until said petition was allowed—filed as a matter of right.

(c) That the original attachment was issued and served on or about the 24th day of March, 1938, on the Morris Wholesale Liquor Distributing Co., Inc., That the sixty cases of liquor referred to herein were seized by an officer without a search warrant, and while loaded for transportation to the City of

Cincinnati, in interstate commerce, being returned to the wholesale company from which they were purchased. That the said Edward Morris was indicted in the Boyd Circuit Court for possessing and transporting liquor without placing tax stamps thereon. That this question to determine whether the tax was valid or not was involved in this transaction. That the Commonwealth of Kentucky and James W. Martin claimed at said time that a sum of $10,000 was due and unpaid by the Morris Wholesale Liquor Distributing Co., Inc., for liquor sold in violation of the Act of 1936, and the Act of 1934. That the obligation arose as a licensee, if any existed, because the said Morris Wholesale Liquor Distributing Co., Inc., did not pay said import and consumers' taxes. That an audit had been agreed upon to determine whether such taxes were due and unpaid, and was made, of the books of the Morris Wholesale Liquor Distributing Co., Inc., and it was determined by said audit that approximately $350 was due to the Commonwealth of Kentucky and James W. Martin; if said tax statute which authorized the levy of said taxes was a valid and binding statute. That the action against Edward Morris, as Secretary and Treasurer of said corporation, was dismissed in the criminal division of the Boyd Circuit Court. That the said Harvey H. Smith appeared at said time as his attorney and answered in the criminal division of said above cause, sued out an injunction against the said James W. Martin, and appeared in said civil action in the Franklin Circuit Court to dismiss the said petition on the grounds said court had no jurisdiction of said cause; and furthermore, that the taxes attempted to be collected were invalid. That on or about the

15th day of May, 1938, an action was brought before the Kentucky Beverage Liquor Control Board, which action, among other things, charged the said Morris Wholesale Liquor Distributing Co., Inc., of selling liquor without tax being paid by it in the sum of $10,000. At this time an agreement was made to audit the books of the said corporation. This attempted cancellation of the license of the Morris Wholesale Liquor Distributing Co., Inc., failed — the said Harvey H. Smith appearing as counsel for said corporation, not for Edward Morris.

(d) That from and after the 1st day of May, 1938, the plaintiffs, James W. Martin, and the Commonwealth of Kentucky, in the said attachment action, were in default in the United States District Court for the Eastern District of Kentucky. That this default will be shown to this Honorable Court by Exhibit D, which is attached as a part of this petition, showing that the Honorable Respondent, Mac Swinford, ignored the rules of the Supreme Court of the United States controlling Civil actions in the United States District Court for the Eastern District of Kentucky.

(e) That on or about the 1st day of July, 1939, James W. Martin, as Revenue Commissioner for the State of Kentucky, separated himself from that office and was succeeded in office at that time by H. Clyde Reeves, who exercised said functions of said office at all the times hereinafter alleged. (Ky. Statutes, Section 999). U S C A 780.

(f) That on or about the 25th day of January, 1939, the defendant, Morris Wholesale Liquor Distributing Co., Inc., made a motion for judgment on the pleadings and to dismiss plaintiffs action before the Honorable United States District Court, and the said, the Honorable Mac Swinford. At the time this motion was made, no effort had been made to secure leave of court for the filing of any pleading on behalf of the plaintiffs, in addition to their said petition, and no response had been made to the motion of the defendants to vacate the opinion of the Judge, which was, the motion to dismiss, and for judgment, January 15, 1939, not a valid motion as a matter of law or fact, though the court being apprised of the fact that the said James W. Martin had not filed any pleading *within six months* prior to that time as provided by the rules of the Supreme Court, a default that could not be cured by leave of court, but the court and counsel completely ignored the rights of defendants, apparently acting in unison all of the time, at least against the rights of the defendant, as it appeared, totally indifferent at all times to the constitutional right of an impartial hearing.

Nor had the rights of Martin's successor in office as a proper reviving officer after the first day of July, 1939, been even suggested, which revivorship is required by both the laws of Kentucky and the laws of the United States, 780 USCA and rule 25 of the Supreme Sourt Rules in order to retain jurisdiction. (249 Ky. 498).

A motion to vacate the opinion of the Judge, far afield of the issues, rendered November 6, 1939,

was filed by defendants and denied on said date — the Court or the Respondent totally ignoring the rules controlling on the court. That Martin's default as plaintiff continued until the time expired to present a revival of the party-plaintiff, after six months. Rule 60 (b)—No pleading thereafter, default must be sustained.

(g) That on or about the 24th day of November, 1939, the defendant, Morris Wholesale Liquor Distributing Co., Inc., acting by Harvey H. Smith, and acting under his power of attorney for the Morris Wholesale Liquor Distributing Co., Inc., and the power of all claimants then in his hands, mailed a motion for a pro-confesso judgment and an answer and counter-claim as required and permitted under the laws of the United States to said Court. (Rule 60).

The record shows that the Answer and Counter Claim was filed of the date of December 11, 1939, with motion for allowance of filing, but the motion for pro-confesso judgment shows a filing record date of February 9, 1940, when it should show a date of January 21, 1940, as plaintiffs had then been in default of pleading. No reply to said motion or responsive pleading was ever filed by plaintiffs, who were, under the rules of the Supreme Court, and under the Code of Kentucky, and under its decisions, *out of the case*, and the action was proceeding ex parte on the counter-claim of defendants. That on February 9, 1940, Motion for Summary Judgment, by defendant, was filed but not shown of record, and said date of pro-confesso motion is not shown, but filed January 21, 1940; and plaintiffs, still in de-

fault of a pleading or a party plaintiff, therefore, again, defendants filed their motion to dismiss plaintiffs entirely from the cause, and abate their cause of action *in attachment.* On this date Edward Morris appeared in person and moved to dismiss Counterclaim of defendants, when all authority to act in this respect or at all, was out of the power of the said corporation under the power of attorney executed to Harvey H. Smith, and under the contract executed by The Morris Wholesale Liquor Distributing Co., Inc., with other claimants.

This was a simple motion to dismiss, signed by Morris, who was not the Morris Wholesale Liquor Distributing Co., Inc., nor did his motion assert it was for the corporation, but for himself.

Harvey H. Smith then demanded in open court that Morris be sworn, and that he have a right to cross-examine him and show the cause of his attempted action, which was to perpetrate a fraud on the court, and his associates in the litigation, but the court refused to swear him, a denial of due process; and thereafter made entry of an *order out of court,* sustaining said motion, in face of the demand of Harvey H. Smith for a hearing, and after actually refusing the motion for parties and refusing to pass on defendants' motion, filed February 9, to dismiss Plaintiffs entirely from the case. All of this evidence under Kentucky law is incompetent.

That Edward Morris and the pretended counsel of James W. Martin, then a stranger to the record and the said H. Clyde Reeves, who was not a party to the action, knew that a cross-examination of the

said Morris would expose the deal made with him to dismiss these claims, they knowing full well that no court, with knowledge, would permit such a fraud being perpetrated in a court of justice of the United States.

It was the law of Kentucky and the law of the United States at the time, of the district court, the court of first instance, was asked to make findings of fact separate from conclusions of law, and refused, and the Circuit Court was asked by a motion for findings to base its decisions upon such findings so as to advise the Supreme Court of the United States. *Neither of these courts made such findings.* The law of Kentucky is the same as the rules of the Supreme Court of the United States, and your petitioners allege that, both of respective respondents, who refused to make such findings denied to your petitioners due process of law, and allege that in a proceeding of equity, accepting the United States District Court's opinion of the character of the case heard by him, that court was equally in error in refusing to make findings: Amendments 5-14 on law issues. (U. S. A.) 686.

We quote rule 70½, which existed prior to the present rules and which is the law of Kentucky: (Quoted in Substance):

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance SHALL find the facts specially and state separately its conclusions of law thereon; and in granting or refusing injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its acts. Such findings and conclusions shall be entered

of record, and if an appeal is taken from the decree, shall be included by the Clerk in the record, which is certified to the appellate court under Rule 75 and 76."

A portion of this rule was added by the amendment of November 25, 1935, which is now rule 52 of the Supreme Court rules. The court also decided under rule 52 (Silverking vs. Silverking, 204 Fed. 166, and 229 U. S. 624) the following: (Quoted in substance). Applied to facts.

"The rule is applicable to all classes of findings in cases tried without a jury, whether the finding is of a fact concerning which there was conflict of testimony or a fact inferred. The rule applies also to make findings and conclusions of law. These rules have the force and effect of law, so that neither the District Court nor the Appellate Court could adopt a practice inconsistent with it. These findings of fact in actions at law had to be ultimate facts. The actual upstanding law was to be the basis of the conclusions of law. It was necessary to make the opinion of the court and the findings of the court or the refusal of the court to make findings a part of the record, which your petitioners endeavored to do in filing a motion for bill of exceptions which was declined by the court. The opinion of the court is insufficient because it does not constitute the grounds of decision, and if there is any evidence introduced it is necessary for the court to make findings of fact. If the District Court fails to make such findings, the Circuit Court of Appeals may order said finding to be made in order that such findings may aid this court in the consideration of the case. The defeated party will be unable to determine whether the case presents a question worthy of consideration by the appellate court if such findings are not made."

In Interstate Circuit vs. United States, 304 U. S. 55, the Supreme Court of the United States criticised the District Court by saying: (Quoted in substance)

> "The district court did not comply with this rule. The court made no findings and did not state separately his conclusions of law the rule required. The opinion of the court was not a substitute for the required findings and it did not constitute the special and formal findings by which the issues were to be determined by the court; and in refusing interlocutory injunctions, the court shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action."

Your petitioners allege that the Circuit Court of Appeals for the Sixth Circuit, on the application for mandamus, refused to consider findings and conclusions of law, and the United States District Court for the Eastern District of Kentucky also refused to make findings, or adopt any portion or reject any portion of the findings moved by your petitioners, and the Morris Wholesale Liquor Distributing Co., Inc., Defendants believe, on sound information, that all arrangements were made with said Ed Morris to dismiss after a legislative deal had been completed, in which one J. W. Chapman became a party, then a member of the Legislature, in charge of a monopoly measure, by which Morris would acquire by license from H. Clyde Reeves the right to export liquor under the terms of a bill then in the Legislature pending.

(h) That an attachment cannot be run or sued out in Kentucky in the Franklin Circuit Court, until there is issued a summons from a court where

jurisdiction is granted as a matter of law. That said attachment was void. That the said cross-petition of the Morris Wholesale Liquor Distributing Co., Inc., was set up on the basis of an agreement entered into on May 15, 1938, between a number of claimants who had paid import taxes in violation of the Constitution of Kentucky, Section 3, Bill of Rights, and of Article 1, Section 8, of the Constitution of the United States, and in violation of sections 171, 172, and 174 of the Constitution of Kentucky. That under the Act of 1934 and under the Act of 1936, and as a matter of law, under the decisions of the Court of Appeals of Kentucky, a suit may be brought by counter-claimant to recover unlawful taxes as a matter of right, one for all.

(i) This agreement provided, among other things, that the Covington Liquor Co., Inc., Blue Grass Liquor Co., and some six other corporations and individuals who had paid illegal taxes to the Commonwealth of Kentucky were to be joined in an agreed action to secure the relief demanded for money had and received in the hands of the Commonwealth of Kentucky and its said Internal Revenue Commissioner. This cross-petition was in the nature of a set-off and counter-claim, which under the laws of Kentucky may be brought to recover said taxes amounting in all, at said time, to more than $100,000; for disclosed and undisclosed parties.

(j) That the Morris Wholesale Liquor Distributing Co., Inc., executed a power of attorney to Harvey H. Smith to act in all respects, and have control of this litigation, and to defend and prosecute the claim of all other persons in Kentucky, who

belonged to this class, and who were interested in the funds then in the hands of the Treasurer of the State of Kentucky that had been unlawfully paid, including both consumers' and import taxes of various and divers persons, which power or contract could not be abrogated by any one party.

(k) That the proportions included in this suit were of such an amount that the said James W. Martin and the said H. Clyde Reeves and his attorneys were interested, being in default, both in pleading, and not providing revivorship to continue said action, and knowing that a motion for judgment must be entered for the defendants on the said claims for taxes, entered into a bargain with the said Edward Morris to provide him with a permit to export liquor from the State of Kentucky under a bill that was to be passed by the Legislature, dividing up the State of Kentucky and the said districts, which districts were to be within the control and discretion of the said H. Clyde Reeves, and said Bill was passed through the Legislature through the influence of one J. W. Chapman, who was a member thereof, and for which bill the said Edward Morris had spent his entire time in lobbying for during the session of the Legislature of Kentucky in 1940, assisting in every way to procure its passage. That said political agreements were made to divide this patronage in business to certain individuals in the State of Kentucky who would receive licenses as your petitioners fully believe.

(l) That in consideration of the reward to the said Edward Morris, he was to appear in the United States District Court for the Eastern District of

Kentucky and personally, himself, without counsel, make a motion to dismiss the cross-petition filed by your petitioners and the said Harvey H. Smith; your petitioners having entered into a written agreement with the Morris Wholesale Liquor Distributing Co., Inc., and having advanced their share of the expense of litigation with the said Morris Wholesale Liquor Distributing Co., Inc., up to said time, and having had at said time a lien for said moneys advanced on the assets of the Morris Wholesale Liquor Distributing Co., Inc., which had been seized by the said James W. Martin and the Commonwealth of Kentucky. That the Honorable Mac Swinford, United State District Court Judge, knew, by pleadings filed in his court, that said charges had been made and that the said Harvey H. Smith, on February 9, 1940, in the court house in the city of Lexington, when the said Edward Morris appeared without service of notice for hearing, demanded that he be sworn, and that the said Harvey H. Smith should have the right to examine him as to the truth of these allegations herein made. That the said Honorable Mac Swinford, then presiding as said District Judge, refused to permit an open hearing or to swear the said Edward Morris. That on the 14th day of February, 1940, following this said hearing in Lexington, a motion to strike and a motion for leave to file a petition setting out the interests of your petitioners in view of Morris' conduct, was presented to the Clerk of said court who admitted that the motion to strike was not filed by him until a later date, and that the petition for making your said petitioners parties was not filed, because motion to strike not allowed, to which was attached the motion for

leave to file, or attached to the said motion to strike, your petitioners are unable to say which. This pleading was presented to the United States District Court in due time and immediately after the alleged hearing on the 9th day of February, 1940, and no filing was made of said motion to strike which raised all of the necessary questions, and which was then in the possession of the Clerk of the United States District Court, and which your petitioners allege and believe was withheld from the record because the Honorable Respondent, Mac Swinford, so directed it to be held, not knowing whether said motion to strike could be filed as a matter of law or not. But before hearing or making entry of said motion to strike, the Honorable Mac Swinford entered a Judge's order at Cynthiana, Kentucky, prepared by J. J. Leary and Sam Rosenstein, attorneys for James W. Martin, a resigned revenue commissioner, and H. Clyde Reeves, which was signed and adopted by the Honorable Mac Swinford, out of the court room in the city of Cynthiana, as your petitioners are informed and allege. That at all the times when this matter was presented to the court, the Honorable Mac Swinford showed hostility towards Harvey H. Smith, your petitioners' counsel in this case, by statements and by refusal to give a fair and impartial hearing, and allow pleadings filed. That the Honorable District Court knew that under the law of Kentucky Ed Morris could not appear for a corporation, and after investigation of this fact he ordered the said corporation which he had found April 1st had been "dissolved," to hold a meeting and pass on a resolution ratifying his decision of March 4th, 1940, over and against the telegraphic demand

for a hearing made by Harvey H. Smith. It being well understood by the said Respondent that the Court of Appeals of Kentucky and the Supreme Court of the United States had decided that no import tax could be levied on merchandise in transit or prior to shipment, and he well knew that the Supervisor of taxes in Kentucky had testified that the tax was levied prior to shipment on whiskey, and that the law provided it should be collected before shipment, and permits to import must be paid before transit; and he well knew that Harvey H. Smith had been employed to collect said taxes by a large number of importers in Kentucky; and the appearing counsel for the said Martin also knew that the effect of a counter claim in this cause would be the collection of a very large sum of said taxes, and tho said counsel had slept on their rights after the resignation of the said Martin, they meant to stay in the cause until they could oust the said Harvey H. Smith, and they sought thereby to defeat this action brought by counter claim, to acquire control of the said Morris, which they did, believing that Morris could dismiss the said counter claim, and thereafter said actions could be defeated under the statute of limitations applying, as they thought, and being not advised as to the contract made with other claimants, the crafty Mr. Ed Morris keeping this secret in his breast. Reading the record will fully inform this court of the Judicial action of said respondent.

Under the laws of Kentucky at said time the Morris Wholesale Liquor Distributing Company had assigned its interest on May 15th, 1938, to your petitioning trustees in order that all claimants would stand on an equal footing, and thereby prevent the